of the United States Constitution." Pet. App. 16a. On February 24, 2005, the trial court denied American Family's motion. *Id.* at 37a-38a; *see also id.* at 5a-10a. On May 6, 2005, American Family petitioned the Missouri Court of Appeals for a writ of prohibition or mandamus, contending that the trial court's order allowing over-inclusive notice to some 24,000 identifiable non-class members who, everyone agrees, have no justiciable claim violated "the due process clause under the Fourteenth Amendment to the United States Constitution." *Id.* at 48a; *see also id.* at 45a-49a. On May 25, 2005, the Missouri Court of Appeals denied American Family's petition for writ of prohibition or mandamus. *Id.* at 52a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. WD-65420 (Mo. Ct. App. May 12, 2004) (unpublished). On May 26, 2005, American Family petitioned the Missouri Supreme Court for a writ of prohibition or mandamus, arguing again that the trial court's actions as to over-inclusive notice violated "the due process clause of the U.S. Constitution." Pet. App. at 53a; *see also id.* at 53a-60a. On June 3, 2005, the Missouri Supreme Court denied American Family's petition for writ of prohibition or mandamus. *Id.* at 62a-63a; *State ex rel. American Family Mut. Ins. Co. v. Messina*, No. SC-86864 (Mo. June 3, 2005) (unpublished).

Section 1 of the Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The Due Process Clause is "'intended to secure the individual from the arbitrary exercise of the powers of government'" *Hurtado v. California*, 110 U.S. 516, 527 (1884), *quoting Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819). *See, e.g., Wolff v. McDonnell*, 418

U.S. 539, 558 (1974). When government officials deliberately decide to deprive an individual of liberty or property, they "exercise . . . the powers of government" directly against the individual.

Throughout its history, the guarantee of due process of law has been directed to government actions that deliberately deprived individuals of life, liberty, or property. This Court has explained the derivation of the Due Process Clause as follows (*Twining v. New Jersey*, 211 U.S. 78, 100 (1908)):

> [T]he proposition universally accepted by American courts on the authority of Code, [is] that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Carta, which provides that "no freeman shall be taken, or imprisoned, . . . or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land."

This language from the Magna Carta obviously was designed to forestall oppression through deliberate acts of government.

As this prohibition has evolved, it has continued to refer to deliberate acts. The phrase "due process of law" has been traced to 28 Edw. 3, ch. 3, which provides:

> No man of what state or condition he be, shall be out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law. Corwin, The Doctrine of Due Process of Law Before the Civil War, 24 Harv. L. Rev. 366, 368 (1911). *See Ingraham v. Wright*, 430 U.S.

651, 673 n.41 (1977). The earliest state cases interpreting the phrase "due process of law" similarly were concerned with the procedures by which deprivations of liberty or property were deliberately imposed on individuals. *See, e.g., Zylstra v. Charleston*, 1 Bay 382, 384 (S.C. 1794) (fine imposed by court without jury); Corwin, 24 Harv. L. Rev. at 372-373.

Until recent decades, this Court's procedural due process cases generally concerned the procedures that were to be followed in criminal enforcement proceedings or in civil suits leading to the entry of judgment by a court. *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1267-1268 (1975). More recently, the Court has specified the procedures that must be followed in other kinds of proceedings leading to a deprivation of liberty or property. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254 (1970); *Bell v. Burson*, 402 U.S. 535 (1971). *See generally Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430-431 (1982) and cases cited. In some instances, it has permitted process to be provided after the deprivation has occurred. *See, e.g., Ingraham*, 430 U.S. at 674-682; *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). But while these "proceedings" often are informal – they might involve, for example, no more than a decision made by a single low-level government employee whose primary responsibility is not the adjudication of claims (*see, e.g., Ingraham; Goss v. Lopez*, 419 U.S. 565 (1975)) – the Court's rulings have applied the guarantee of procedural due process in the way envisioned at the time of the Magna Carta: to define the procedures the government must follow when its agents deliberately impose a loss of liberty or property on a person.

The Due Process Clause does not deny a state the right to deprive persons of property or liberty, so long as it provides due process prior to (or, in some situations, soon after) the deprivation. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978). And the state, unless it acts in a wholly arbitrary way (*see Martinez v. California*, 444 U.S. 277, 282 (1980)), is responsible for setting the substantive criteria that, if met, will justify a deprivation. *See, e.g., Bell v. Burson*, 402 U.S. 535, 541 (1971); *Goss v. Lopez*, 419 U.S. 565, 573-574 (1975); *Hudson v. Palmer*, No. 82-1630 (July 3, 1984), slip op. 12-18; *See also id.* at 3 (O'Connor, J., concurring). *See generally Logan*, 455 U.S. at 433; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 11-12 (1978).

The role of procedural due process in this regime historically has been to guarantee that a person threatened with (or suffering from) a deprivation receives an "opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1924). *See Mullane*, 339 U.S. at 313. This opportunity serves to forestall arbitrary state action and "minimize[s] substantively unfair or mistaken deprivations of life, liberty, or property by enabling persons to contest the basis upon which a State proposes to deprive them of protected interests," *Carey*, 435 U.S. at 259-260, *quoting Fuentes v. Shevin*, 407 U.S. 67, 81 (1972); adequate process helps assure that the state will take into account the factors that it has deemed relevant to the deprivation. In the Petitioner's case, there is no means by which Petitioner can "be heard" on, or to defend, the fact that 24,000 class members now have been included in a class in which they should not have been included. There is no procedural mechanism in Missouri law that permits the Petitioner to argue to a jury or to the bench that specific members of the class either have no claim, or that their

claim is far different than the nature of the claims being tried in the case below. 24,000 persons were summarily swept into the pool and, in effect, camouflaged to blend in with persons who fell within the parameters of the defined class. The unconstitutional deprivation of Petitioner's due process rights occurred at the very moment the trial court ordered that the 24,000 additional class members be included in class and the underlying suit. The due process clause guarantees Petitioner the right to be heard and to have a claim of right fairly judged. The trial court's ruling denied Petitioner that right.

II. Certiorari Should Be Granted In This Case Because The Decisions Below Violate The Contracts Clause Of The Constitution Of The United States.

A. The Decisions Below In This Case Have Essentially Rewritten The Material Terms And Conditions Of American Family's Insurance Policies In Violation Of The U.S. Constitution's Guarantees Of Freedom To Contract.

This case involves the contractual rights of American Family Insurance policyholders. The rights of these policyholders is limited to the specific terms and conditions of their respective policies. The policy language governs American Family's duties and obligations to each policyholder.

The effect of the trial and appellate courts' rulings below, to include 24,000 persons in a class in which they did not qualify, was to redraft otherwise valid American Family insurance policies. Stated another way, policyholders who had no valid claim under their policies were

afforded the opportunity to bring and be made part of a lawsuit seeking damages, where the damages sought were not damages the 24,000 additional class members were entitled to based on their particular situations. This Court has for nearly a century prohibited any governmental act impairing the rights of persons, including corporations like the Petitioner, to contract in other states. This Court in 1911 in the case of *Walker v. Lovitt*, 250 Ill. 543, 549, 95 N.E.2d 631 (1911) clearly stated that persons enjoy a constitutional right to make contracts without interference from governmental bodies:

> If it is undertaken to invalidate legal contracts . . . the case is different. Such action would deny to the parties to the contract the equal protection of the laws and abridge their privileges as citizens of the United States, and deprive them, without due process of law, of the liberty of making contracts . . . in regard to their property . . . *Allgeyer v. State of Louisiana*, 165 U. S. 578, 17 Sup. Ct. 427, 41 L. Ed. 832.

The ruling against the Petitioner by the trial and appellate courts below is inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The trial and appellate courts' decisions in this case have essentially rewritten the material terms and conditions of the Petitioner's insurance policies with their policyholders without the Petitioner's or the policyholders' consent. The rulings below extended greater benefits to the 24,000 additional class members that they otherwise would not have been entitled to. This unilateral alteration of this

contractual relationship violates the Constitution's guarantees of freedom to contract.

> Article I, section 10, of the United States Constitution provides that no state shall pass any bill or law that impairs the obligations of parties to contracts. U.S. CONST. art. I. *See also, Tidal Oil v. Flanagan*, 263 U.S. 444 (1924). Although no explicit constitutional language protects the sanctity of contract against federal legislation, this Court has held that the Due Process Clause in the Fifth Amendment contains essentially the same effect. *Lynch v. United States*, 292 U.S. 571 (1934) (invalidating Congressional attempts to cancel certain types of insurance policies). Both the federal and states' constitutions prohibit the enactment or enforcement of laws impairing the obligations of contracts. *Superior Motors, Inc. v. Winnebago Indus., Inc.*, 359 F.Supp. 773, 777 (D.S.C. 1973).

For nearly two centuries, the United States Supreme Court has routinely declared invalid governmental acts that substantially impair or affect the contractual rights of parties. *See generally, Fletcher v. Peck*, 10 U.S. 87 (1810); *College v. Woodward*, 17 U.S. 518 (1819); *New Jersey v. Wilson*, 11 U.S. 164 (1834); *Perry v. United States*, 294 U.S. 330 (1935).

Generally, any judicial or legislative act that attempts to make material alterations of the character, terms or legal effect of existing contracts is clearly void. 16A C.J.S. Constitutional Law, section 353 et seq. Of this character are legislative acts that attempt to add a material condition or provision to a contract and those which attempt to release stipulations therein. *Id.* It may be said that a legislative enactment impairs the obligations of a contract

when it attempts to take from a party a right that he is entitled to by its terms. *Superior Motors, Inc.*, 359 F.Supp. at 773. Thus, judicial action or legislation which attempts to make material alterations in the character, terms or legal effect of an existing contract impairs the obligations of that contract. *Id.* at 777. Furthermore, all judicial and legislative acts that impose added conditions or duties on parties to a contract are void if they produce a change in the obligations or substantial rights of the parties. *Id. See also*, 16A C.J.S. Constitutional Law, section 353 et seq. Other material alterations that would impair the obligations of contracts are those that alter the extent of liability under a contract or which empower courts to rewrite contractual agreements substantially. 16A C.J.S. Constitutional Law, section 353 et seq.

A basic and cherished principle in this nation is that the right of parties to structure contracts in accordance with their wishes and expectations is protected under our Constitution. *See generally, Hedge v. Evans Financial Corp.*, 707 F.2d 1566 (D.C.Cir. 1983). If the freedom to contract under the Constitution is to retain its true meaning, it must be understood that it does impose limitations upon the power of legislatures, and courts for that matter, to abridge existing contractual relationships. *See generally, Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978). This constitutional guarantee is not limited to individuals. Commercial parties are also afforded constitutional protections to enter into contracts freely and to accept only those terms and conditions that they desire to undertake. *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*, 619 F.2d 1001 (3rd Cir. 1980).

In the instant case, the trial and appellate courts below have essentially rewritten the material terms and

conditions of countless insurance policies without either the Petitioner's or the policyholders' consent. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract. The Constitution clearly prohibits such an expansion of key contract provisions without the authorization and consent of the parties to that contract.

Here, the effect of the rulings by the trial and appellate courts are inconsistent with the constitutional guarantees afforded to persons and corporations to enter into contracts freely and to be subject only to those terms and conditions that they contemplate and accept. The trial and appellate courts' complete disregard of the existence of varying terms and conditions in various insurance policies eliminates Petitioner's right to contract to undertake certain specific risks. This unilateral alteration of this contractual relationship violates the Constitution's guarantees of freedom to contract.

Accordingly, for this reason alone, this Court should grant Petitioner's petition. Ultimately, the *amicus curiae* believes that this Court should reverse the decisions below and enter judgment in favor of Petitioner so that the freedom to contract freely will continue to be upheld as one of the central freedoms afforded to the citizenry of Missouri.

B. Judicial And Governmental Alterations Of Private Contracts Are Permitted Only In Limited And Exceptional Circumstances, None Of Which Are Present Here.

The *Amici Curiae* acknowledge the right to freely contract is not absolute. There are certain limited and

exception circumstances where a legislature or court may alter private contracts and such alterations will withstand constitutional challenge.

The first exceptional circumstance where a private contract's terms and conditions may be altered is where the parties to the contract affected by the modification give their consent to such alteration. *See generally*, 16A C.J.S. § 344. In the instant case, there are no facts that suggest Petitioner or its policyholders consented to the wholesale modifications to the policies effectuated by the trial and appellate courts. Clearly, the "consent" exception is inapplicable here.

During periods of emergency, alterations are sometimes authorized and held not unconstitutional as an impairment of the contractual obligation. *See generally*, 16A C.J.S. § 344. Again, the record contains no evidence that any pressing emergency warranted any narrowing of Petitioner's policies at issue in this case. In the absence of any such exigent circumstances, the "emergency" exception clearly did not apply so as to constitutionally justify the trial and appellate courts' rulings in this case.

Private contracts may also be altered where the interests of the public welfare are at stake. Again, the record is completely devoid of any allegation that the trial and appellate courts' rulings were based on the interests of preserving and protecting the public interest and welfare. Accordingly the decisions of the trial and appellate courts must be vacated by this Court and Petitioner's right to protect its contractual terms and conditions must be reinstated. Otherwise, if the decisions of the courts below are permitted to stand, a mixed message will be sent to Missouri courts and courts across the country about how far a legislature, or a court for that matter, may go to re-write an otherwise

unambiguous private insurance contract. Furthermore, individuals and corporations in Missouri and across the nation will be forced to enter into private contracts with a significant degree of uncertainty as to whether their duties and obligations under their contracts will be changed without warning at some point by a legislature or court.

CONCLUSION

For the foregoing reasons, the Property Casualty Insurers Association of America respectfully requests that Petitioner's Petition for Writ of Certiorari be granted.

Respectfully submitted,

RICHARD A. HODYL, JR.
Counsel of Record
MECKLER BULGER & TILSON, LLP
123 North Wacker Drive
Suite 1800
Chicago, Illinois 60606
(312) 474-7968

Counsel for Property Casualty Insurers Association of America